THE IMPORT OF THE FETIAL INSTITUTION

By Tenney Frank

Every general handbook on international law begins with a chapter describing the remarkable institution of the Roman fetial college, a semireligious, semipolitical board which from time immemorial supervised the rites peculiar to the swearing of treaties and declaration of war, and which formed as it were a court of first instance in such questions of international disputes as the proper treatment of envoys and the execution of extradition. Polybius, the first foreign student of Roman statecraft, quickly noticed this institution as unique (xiii. 3 and frag. 157); Hugo Grotius, the father of modern international law, pointed it out as a worthy example for his degenerate day, and many are the students of history who, like Bossuet, Maine, Mommsen, and Bryce, have remarked upon its high significance. The most noteworthy point in the practices of the fetial board is doubtless the assumption, which underlay every treaty as well as every declaration of war, that peace was the normal international status and that war was justified only on the score of an unjust act, as, for instance, the breach of a treaty, a direct invasion, or the aiding of one's enemy. Such is surely the implication of the formulae used at the opening of a war, as in the following, preserved by Livy (i. 32. 7–10): "Hear me, Jupiter, I call you to witness that *that nation is unjust* and does not duly practice righteousness," and again "if I *unjustly or impiously* demand that the aforesaid offenders be surrendered then permit me not to return to my country."[1] None of the phrases or formulae of the fetials presuppose for a moment the conception of international policies that possessed Solon when he advocated conquest for the sake of national glory, or Aristotle when he justified the subjugation of barbarians on the score

[1] *Audi Iuppiter . . . . ego uos testor populum illum iniustum esse neque ius persoluere. . . . . Si ego iniuste impieque illos homines illasque res dedier mihi exposco, tum patriae compotem me numquam siris esse.* For a collection of sources dealing with the institution see Wissowa, *Religion und Kultus*, 475; Pauly-Wissowa, *s.v.* "Fetial"; Weiss, *Le droit fétial;* Fustel de Coulanges, *La cité antique*, 4; Phillipson, *The International Law and Custom of Ancient Greece and Rome* (not always trustworthy).

of natural superiority, or that inspired oriental nations to fight for the extension of their religion, or modern statesmen to employ war as a means of furthering commercial interests. The early Roman practice rested rather upon the naïve assumption that tribes and states, being collections of individuals, must conduct themselves with justice and good faith, even as individuals.

Of late, to be sure, the general attitude toward the fetial institution has not been very favorable. Laurent in his influential *Histoire du droit des gens*, III, propounded the theory that the word *iustum* was here as in several other legal formulae merely a technical term referring only to the correctness with which the priests performed the necessary formalities at the opening of a war, that in fact any war which had been opened in the prescribed manner was called a *bellum iustum*, even though the demands were inequitable. The passage on which he based this claim was Cic. *De rep.* ii. 31: "Our fathers thought no war *iustum* unless due request for restitution was first made, and the war formally proclaimed." It is clear that this conclusion rests upon a fallacy of the undistributed middle; furthermore, that it cannot possibly fit the part of the formula wherein the enemy is charged with having been *iniustum* (*ego vos testor populum illum iniustum esse neque ius persolvere*, Livy *loc. cit.*)[1] Yet Laurent's view has constantly gained ground and is now very widely accepted.[2] What has so favored the spread of his otherwise ill-founded theory is a group of disagreeable instances dating from the late republic of a treacherous disregard for equity under shadow of a literal application of the regular formulae. Authentic Roman history unfortunately begins at a time when Rome's religious and moral conceptions were breaking down under a new-found religious skepticism and a bewildering mass of new political experiences that refused to be handled in accordance with ancient set formulae. At times the fetial law had to be disregarded, and, as was inevitable in times of moral readjustment, became now a dead letter to be replaced by higher general principles, now a form to be invoked as an excuse for deeds

[1] Cicero practically repeats the statement in *De off.* i. 36, where he shows clearly that he refers to ethical considerations, for he amplifies his meaning with the words *aequitas* and *iustas causas* (i. 38).

[2] Marquardt *Staatsverwaltung* III, 415: D. Buret *Le droit de la guerre chez les Romains*, 1888; Geoffroy *Le droit de la guerre à Rome, et al.*

of treachery. In these circumstances even the Roman historians occasionally lost sight of the earlier seriousness of the institution, as when they invented the tale of the trick played after Caudine Forks wholly in the spirit of a treacherous act perpetrated in Spain almost two centuries later. However, this inevitable failure of the later Romans to understand a practice that arose and contained significance during an age of simpler thinking and acting must not blind us to the real importance of one of the most striking of political institutions. To grasp the true meaning of the fetial law I think it is necessary finally to abandon the later legalistic interpretation that came from a day when it could no longer be understood, and even to give up the attempt to match favorable with unfavorable instances of its application from the days of the late republic. The only profitable course left us is to apply our historical imagination in an attempt to reconstruct the body of social conceptions out of which the formulae must have arisen, and, in the setting thus obtained, seek for a reasonable meaning of the whole institution.

Now it becomes evident at once that the essential element of these formulae is the oath[1] of good faith that was spoken upon the making of the treaties as well as the oath of innocence taken when war was declared; and this fact brings us to the consideration of the immense importance of the oath in primitive institutions. In the days of early tribal life (and the use of the silex[2] proves that we are dealing with an institution of very early origin) before the state creates a machinery of justice, the protection of personal rights devolves upon private initiative, and when that fails, upon the practice of blood-revenge[3] administered by the proper member of the clan. However, even this protection is insufficient, since it fails to aid such isolated members of society as the stranger and the beggar, and even the parent, whose relationship is too close to permit interference by any other kinsman. But every tribe gifted with the least sense of logic makes the necessary deduction, and concludes from the vengeance that protects the average tribesman that there are gods who also care for these other members of society;

[1] Cf. the passage quoted above, also the oath quoted by Paulus 115: "Si sciens fallo tum me Diespiter . . . . eiciat ut ego hunc lapidem." See also Polyb. iii. 25.

[2] See Warde Fowler, *The Religious Experience of the Roman People*, p. 130.

[3] Westermarck *Origin and Development of Moral Ideas* I, chap. xx.

and consequently such members have ever secured a fair meed of protection.[1] Whether the specific belief in each case be that the wronged soul pursues the offender or that the god protects the otherwise unprovided-for individual, the reasoning that underlies the various beliefs is the same. In all cases the inference is drawn from the great body of instances of blood-revenge and from the demand for equity which underlay the practice of blood-revenge that somehow protection is accorded all men within the state.

Now whether such reasoning will proceed farther and consider its conclusions as valid beyond the tribe, will depend upon the tribe's religious conceptions and general habits of thought. There have been numerous tribes that have never developed any permanent system by which amicable intertribal relations could be established. But among the primitive tribes which have gone farthest in creating a machinery for peaceful intercourse with foreign peoples the early Romans are perhaps the most notable, and their advance was made by a logical extension beyond the state of the beliefs which we have just mentioned; and the device by which this extension was made possible was the oath. Of course the oath was not peculiar to the Romans, even in intertribal relations. The Greeks also swore alliances and friendships and believed that the breach of oath let loose the ἄρα, a kind of avenging spirit which guarded pacts as the Erinyes guarded blood-relationships. They even thought of a special god as guardian of oaths, a creature who would "punish men beneath the earth" for an infraction of the sacred pact. How immensely important the oath was in Roman legal practice every Latinist knows, and recalls that centuries after the state had created an elaborate judicial machinery, this cumbersome device still remained in vogue. In the making of interstate pacts, the oath sworn by the fetial priest was all-inclusive in its seriousness, the formula being: "If the Roman people . . . . break this treaty, then do thou Jupiter so strike down the Roman people as I now strike this offering, and so much harder as thou art stronger" (Livy. i. 24. 8).

[1] We need give only a few examples of this well-recognized fact: *Odys.* 8. 546, a guest is ἀντὶ κασιγνήτου; *Odys.* 21. 27 and 17. 475, Zeus protects the beggar; Livy 39. 51, *scelus occidendi hospitis*; Gellius, 5.13. See, further, Hobhouse, *Morals in Evolution* I, chap. iii; E. Meyer *Anthropologie* 42; Leist *Graeco-Ital. Rechtsgeschichte* 312.

It would be a work of supererogation to discuss whether the infraction of the oath, either among the early Romans or any other primitive people, could be devoid of moral significance and whether it could be atoned for by simple performance of correct rites that would satisfy the gods. That is entirely out of the question, for we are dealing with the very institutions that brought ethical considerations into religious beliefs and made the supermundane spirits guardians of relationships for which states had as yet failed to provide. And as surely as the human need for justice which first created these forms was permanent, so surely has that need, quite independent of the fate of the ritual, invariably kept the institution of the oath sacred, at least until the state has created the requisite machinery for the guardianship of equity. Primitive society does not allow itself to be utterly hoodwinked in such matters, and it is needless to insist that the tribe as well as the individual that fails to observe the oath quickly pays the cost by being put beyond the pale of ordinary relationships. When the absolute need for a practice makes it sacrosanct, the practice may not be treated as of small concern. In matters of mere religious import Orestes could trick the gods and escape serious consequences by means of sacrifice—the poet did not concern himself greatly over the matter—but when the crime touched sacrosanct human relationships, when it had been committed against his mother, the sin was no longer a matter to be dealt with by a simple sacrificial rite.

So far then as the Roman fetial law centered about the oath and so far as the intended war touched a tribe with which Rome had a sworn treaty, we need not for a moment doubt the real ethical importance of the formulae. But it is at this point that Rome's international practice took on a peculiar development, advancing in its logic a step farther than in most states; for it gave the formulae a general application in all intertribal relationships regardless of whether there was a treaty or no. In all declarations of war[1] alike the fetial priest was called in to repeat the demand for equitable restitution, and in every instance he stated under oath that the war was declared because *populum illum iniustum esse neque ius persolvere.*

[1] Cf. Cic. *De off.* i. 36; *De rep.* ii. 31, "omne bellum"; and Varro in *Non.* 529, 23.

We need not suppose that it was a peculiar proneness toward morality that induced the Roman state to inaugurate this important custom. The innovation was rather a resultant of various favorable circumstances, the foremost being no doubt the accident that the Romans inherited from their ancestors a belief in Jupiter[1] (Father Light) as a universal rather than a tribal god, and that they were surrounded by tribes which worshiped the same deity. This accident saved the Romans from the pitfall that has lain open to so many primitive peoples of regarding themselves as the god's favorite people with exclusive monopoly of his protective power against all comers, or even as his special missionary chosen to spread his faith. Jupiter never was a partisan, as were most of the gods of the East. When a Roman desired to break the word he had given his Latin or Sabine or Volscian neighbor in the presence of Jove he could not easily delude himself into the thought that Jove would take his view of the matter rather than his neighbor's. A second circumstance was of hardly less importance. The Latin tribe inhabited the comparatively fertile valley lands of the Tiber, whereas all the surrounding tribes, their potential enemies, possessed far inferior fields in the arid limestone mountains roundabout. Now it is a commonplace that the tribes of the plains have always discovered the advantages of peace before the highlanders. For centuries the situation was such that the Latins had all to lose and little to gain by recognizing practices of brigandage and lawlessness. They therefore naturally arrived at the conviction early that neighboring tribes must dwell in peace, that brigandage must be suppressed, and that the rules of equitable dealing which are observed by well-balanced individuals should also hold between neighboring tribes. And if their less fortunately blessed neighbors did not understand this perfectly apparent truism, they were ready to issue their *quos ego!* through the mouth of their fetial priest.

Viewed thus from its origin, it becomes evident that the phrase *iustum piumque* has absolutely nothing to do with the mere ritual correctness of a priest's action. The whole fetial practice arose with the need for equitable dealings between tribes and developed with the ideas that begot ethical import, not only in human but also in

[1] Cf. E. Meyer *Geschichte des Alt.* I², 775-77; Warde Fowler *The Religious Experience of the Roman People* 128.

religious institutions. The absolute genuineness of the elaborate custom cannot for a moment be doubted.

However, in having said this much, we are by no means making the unreasonable claim that the fetial rule invariably secured justice. After all, the Roman senate reserved to itself the right of final judgment; and a grievance usually appears more serious to the offended than to the offender. It is furthermore a matter of course that grievances can readily be discovered when intertribal enmity reaches the breaking point through an accumulation of petty offenses or through natural antipathy. Into that question we cannot enter here. Suffice it to say that the Romans appear neither more nor less hypocritical in their diplomacy than the average modern nation.

A more important question is how long the rules retained their original importance. Obviously they had no appreciable value under Augustus, who restored them with archaeological zeal, for equity can have little consideration in a régime which proposes *debellare superbos*. Neither could they have been regarded with real respect by the senate of 137 B.C., which so hypocritically obeyed their letter in the Mancinus affair. The senate of 170 B.C. perhaps more honestly showed the then existing attitude toward the rules by frankly disregarding them, when the real interests of the state (and doubtless the cause of justice) called for a war with Perseus, even though an overt act of injustice, as the letter of the law prescribed, could not be proved with certainty. For the century before that date we are in some doubt about the current interpretation of the rules. The rupture of the Caudine treaty in 321 B.C., as described by Livy (ix. 10) is unhistorical and cannot be invoked as evidence in the question (see Nissen's entirely convincing exposition in *Rhein. Mus.* XXV 1 ff.); but so far as we know, there is no act in Roman history before the opening of the first Punic war which can prove that the fetial law was not honestly interpreted and sincerely adhered to.

The epoch in which that war falls was one of great change in Rome's conceptions of political and legal problems.[1] Greek philosophy was gaining entrance with its searching criticism of common-sense morality. Direct contact with foreign peoples on all

[1] Warde Fowler, *op. cit.*, chaps. xi–xv, has brilliantly sketched what he calls the petrifaction and disintegration of the Roman religion during this period.

sides revealed the fact that older and more civilized states possessed short-cut methods of diplomacy as well as more convenient and advantageous political theories—theories wherein the naïve assumption that the state was judged by the standards of the individual found no acceptance. Even Roman jurisprudence was severing itself at this time from ritualistic entanglements, was finding an independent basis upon more general grounds of equity, and was raising up a new machinery within the state independent of religious sanction for the administration of justice. At such a time of intellectual ferment it is not surprising if the validity of the fetial rules was occasionally questioned. However, in a state which possessed as strong a conservative party as republican Rome, a severance from so important an institution could not be very rapid. Polybius still found in the second century B.C. that fairness in international practices distinguished Rome among nations (frag. 157). We are safe in believing that up to his day the rules remained in quite regular use and that they received as straightforward application as might be expected of the average nation which sincerely desires its word to be respected. That they should have continued in effect after Rome became mistress of the world no one could hope, for no nation has as yet succeeded in suppressing the lust for dominance after gaining a political preponderance over its neighbors.

We cannot, however, concern ourselves here with the ultimate fate of the rules. It is sufficient if we have established the fact that they arose out of a need for equitable dealings between tribes and were interpreted as containing a precise ethical meaning through the long period of Rome's growth; that, in fact, their application was never a mere question of how correctly a given form was carried out before the eyes of God. Thus understood, the institution proves not only to be significant for the history of international law, but to be an important fact in early Roman history, in the light of which Rome's national growth can the more safely be reconstructed. Any historian who neglects its true import will fail to reach a reasonable interpretation of the legends of the early republic, or a safe conception of the real course of events through the remarkable epochs of the fourth and third centuries B.C.

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